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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

	)	Subcase No. 01-02064
	)	(Hydropower Storage Claim at American Falls)
In Re SRBA	)	
Case No. 39576	)	RESPONSE OF IDAHO POWER
	)	COMPANY TO THE UNITED STATES'
	)	MOTION FOR SUMMARY JUDGMENT
	)	
	)	
	)	

Idaho Power Company, by and through undersigned counsel, hereby submits this
Response to the United States' Brief in Support of its Motion for Summary Judgment ("U.S.
Brief") in the above captioned case.

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INTRODUCTION

Words have meaning. Words in a contract are included because the parties intended those words to have a specific meaning. Words in federal legislation and in official Congressional Committee Reports explaining legislation are included intentionally and are intended to have meaning. The United States, as well as the State of Idaho and the American Falls Spaceholders, have submitted briefs to this Court that repeatedly ignore meaning-laden words such as "active" and "on our demand," and that imply that certain words in relevant legislation have no meaning. This strategy, while beneficial to the opposing parties' arguments, must be recognized and rejected by this Court.¹

Idaho Power Company ("Idaho Power", "the Company," or "IPC") entered a contract in 1923. The United States was a signatory to that Contract. The 1923 Contract provided Idaho Power with 45,000 acre-feet of active storage capacity in the American Falls Reservoir, and 255,000 acre-feet of secondary storage capacity in the American Falls Reservoir. That contract is still in force today and the Company is asking this Court to recognize the rights afforded to Idaho Power in that contract. In particular, this case is about whether or not the secondary storage capacity right of 255,000 acre-feet in American Falls Reservoir is still a valid contract right.

There have been no documents produced in this litigation – among thousands of pages – that opposing parties can point to in which the parties agreed to rescind the 1923 Contract rights held by Idaho Power. Instead, the United States and the other parties attempt to re-interpret statements and misquote documents to support their arguments that Idaho Power Company's

¹ From this point forward Idaho Power Company focuses this Response on the U.S. Brief. However, the issue of selective and misquotations addressed in this Response are equally applicable to the Briefs in Support filed by the State of Idaho and the Spaceholders.

secondary storage capacity right is no longer valid and should not be recognized by this Court. As explained below, all of the United States' arguments fail.

One additional issue not previously addressed by Idaho Power Company was raised by the United States in its Brief. Specifically, one of the United States' implied arguments is that Idaho Power Company abandoned its secondary storage capacity contract right due to an alleged long period of non-use. The Company agrees with the United States that this Court's determination of whether Idaho Power Company's contract rights remain in force should be analyzed by applying legal analysis pursuant to established contract law, not legal analysis based on equitable doctrines. Clearly, Idaho Power did not abandon its contract rights under the law, and the Company outlines the legal basis for this conclusion below.²

Prior to moving on, however, Idaho Power must respectfully urge the Court to closely read the language that the United States, and the State of Idaho and Spaceholders, use in their respective briefs when they claim a) that Idaho Power rescinded its contractual rights; b) that federal legislation overturned those rights; or c) that a court rescinded those rights. The parties simply ignore key words, reading those words as if they have no meaning in order to support their respective arguments. This strategy was used by the parties in their original briefs in 2009, and it is repeated throughout the various briefs submitted in this phase of the litigation.

For instance, when alleging that Idaho Power Company holds only 45,000 acre-feet of storage capacity in the American Falls Reservoir, the United States quotes the 1976 Spaceholder contract, which states that the United States will:

² Idaho Power also fully analyzes the United States' claim concerning the trust relationship between the parties. Idaho Power Company reminds the Court that this issue is not one the Court must address in this proceeding. The only issue at play is whether Idaho Power's contractual rights are valid. How those rights are implemented is an issue that will be addressed by the parties moving forward.

continue to make available to the Placeholder [Idaho Power]
stored water accruing to 2.6471% of the **active** capacity of the
Replacement Dam unless the Placeholder is in default

U.S. Brief at 39, *citing* 1976 Placeholder Contract at 10 (emphasis added).

The United States uses this passage to support its claim that Idaho Power Company holds only 2.6471% of **storage capacity** in the Reservoir. The United States completely reads the pivotal term "active" out of the contract. "Active" as opposed to "Secondary."

Likewise, the Court should note that Idaho Power Company cannot "schedule for release" or "demand the release of" its secondary storage capacity. The only stored water Idaho Power Company can specifically call for the release of is its 45,000 acre-feet of active storage capacity in the Reservoir. The secondary storage capacity is a right held and operated by the United States, pursuant to the terms of the 1923 Contract governing the water's release. As previously noted in Idaho Power Company's Brief in Support ("IPC Brief"), the secondary storage right is not a traditional storage right, and the Company does not have the right under the 1923 Contract to call for this storage. Instead, the contract requires water to be released by the United States during certain periods of the year in order to provide sufficient flows to allow the Company to generate power below Milner dam. This action was initiated, in part, because the United States has failed to meet the terms of the Contract and provide those flows.

The United States ignores this nuance when it quotes statements by Idaho Power staff and representatives in support of the allegation that Idaho Power Company represented to various parties that it only held 45,000 acre-feet of storage in the Reservoir. Case in point, on page one of the U.S. Brief, the following quote appears:

The storage ... water going through American Falls Dam, of course is first used for irrigation service. We [Idaho Power Company] have a right to utilize only 45,000 acre-feet **upon our demand**. (emphasis added).

This is an excerpt from the testimony of IPC's Robert Hogg before Congress in 1973. The statement is again referenced on page 17 of the brief to support the United States' allegation that "Idaho Power Company went on record that it could demand no more than 45,000 acre-feet of water be used for power generation." In fact, Mr. Hogg said nothing of power generation, and he certainly was not making reference to Idaho Power Company's secondary storage capacity right because it was understood at the time that the secondary storage was not storage capacity the Company could "demand."

Likewise, on page 33 of the U.S. Brief, the United States selectively quotes from House of Representatives Report 94-531. The United States' quote reads as follows:

Instead Congress was led to believe that ... 'there has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for the 45,000 acre-feet' of water continued [sic] in the 1976 Spaceholder Contract.

What the House Report actually says is a bit different:

There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for the 45,000 acre-feet (2.65 percent of the storage capacity) **whose release the power company can schedule for the purpose of generating electric energy.**

H.R. Rep. No. 94-531.

There is no reference to the 1976 Contract. There is no reference to secondary storage capacity rights which the company cannot "schedule for release" because the release terms are set by contract. There is only a reference to the active storage capacity that the Company can schedule for release; namely, its 45,000 acre-feet of storage in the Reservoir.

Idaho Power Company urges the Court to read the language quoted in opposing parties' briefs carefully, and to compare the quotes to the cited documents. Just as is the case when the Court interprets legislation, every word in a contract, in legislative language, or in a court

opinion was intended to have a meaning and must be read in a manner that imbues the words with meaning.

RESPONSE TO ARGUMENTS

Idaho Power Company incorporates all facts and exhibits previously submitted into this Response by reference. The facts are clear that all parties recognized the Company's secondary storage right through the early 1970s, IPC Brief Ex.'s 1-50, that Congress specifically protected those rights in the 1973 reconstruction legislation, IPC Brief Ex.'s 51 and 52, and that no document or agreement exists that rescinds those rights. The Company specifically responds to the claims included in the United States' brief in a point-by-point manner below, but notes that the Court must apply contract law principles to determine whether the Company's contract rights are still in force. First, however, the Company must address various "fact" allegations included in the U.S. Brief which are inaccurate.

I. KEY FACTS CITED BY THE UNITED STATES TO SUPPORT ITS ARGUMENTS ARE SELECTIVE, MISINTERPRETED, AND DO NOT SUPPORT SUMMARY JUDGMENT

As noted in the introduction, the United States misquotes various statements made by Idaho Power Company and reads key words out of existence to support its arguments. This strategy runs rampant throughout the U.S. Brief. The United States also presents various statements as "facts" in the opening portion of its brief which are simply inaccurate. Since many of those "facts" are used as the basis for the United States' arguments, we are obliged to address them in this section prior to moving forward with our Response.

A. Idaho Power Company Did Not "Acquiesce to Reclamation Non-Delivery Of Water."³

The reason we are before this Court is because Idaho Power Company determined the United States Bureau of Reclamation ("BOR" or "Reclamation") had not been providing the contracted-for flows below Milner Dam. The Company's Expert Report establishes the basis for the Company's claim that there were shortages in certain years.

As presented in detail in the IPC Brief, the United States and this Court acknowledged, following the enactment of P.L. 93-206 (the 1973 dam and reservoir "reconstruction" or "rebuild" legislation), IPC Brief Ex. 2, and P.L. 94-164 (the dam and reservoir reconstruction "bond legislation"), IPC Brief Ex. 65, that Idaho Power Company held a secondary storage capacity right in American Falls. *See e.g.* IPC Brief, Ex.'s 57 (1977 BOR memo from Martz recognizing the Company's secondary right), 62 (the Amended Findings of Fact and Conclusions of Law filed in this Court's Confirmation Proceedings noting that the rebuild legislation specifically protected Spaceholders' proportionate storage right existing prior to the Act's enactment), and 68 (an additional BOR memo from Martz speaking specifically to the fact that Idaho Power Company was paying Operation and Maintenance charges for its secondary storage capacity).⁴ Further, the United States acknowledges that in the 1980's, flow targets below Milner were met in "wet years." U.S. Brief at 30.⁵

Regardless, the real issue associated with such "acquiescence," even though the United States has only implied it, is that "acquiescing to Reclamation's non-delivery" means that Idaho Power Company abandoned the right under the law. This can be the only legal claim stemming from the allegation, even though the United States has opted to only imply abandonment.

³ U.S. Brief at 1.

⁴ Ex. 68 is attached to this Response.

⁵ Of course, when flow targets were being met there would simply be no reason for Idaho Power Company to question the BOR's operation of the Reservoir.

Regardless, contract law principles, as detailed in Section II below, simply do not support such an argument. There was no intent on Idaho Power Company's part to abandon its secondary right, and no party can point to an overt act taken by Idaho Power Company – an element of abandonment of a contract right – that supports the implied abandonment claim.

The United States' claim that Idaho Power Company acquiesced to BOR's non-delivery of water is not supported by the facts, the United States' own Brief, and is an insufficient basis for establishing abandonment of a contract right.

B. Idaho Power Company's Secondary Storage Capacity Right Was Not Terminated "Long Ago."⁶

There are numerous reasons why this cavalier statement is incorrect. Aside from those enumerated in Idaho Power Company's Brief, and those discussed herein, the United States itself has recently recognized Idaho Power Company's secondary storage right in this very case.

Remarkably, despite its arguments that Idaho Power Company only holds 45,000 acre-feet of storage in American Falls, the United States believes that 300,000 acre-feet per year of storage in the Reservoir should be available for power generation. For, in its Objection in subcase 1-2064 dated 10/16/97, the United States includes the following language under "Purposes of Use:"

Irrigation Storage should be 1,655,000 AFY
Irrigation from storage should be 1,655,000 AFY
Power Storage should be 300,000 AFY
Power from storage should be 300,000 AFY.

Based on this filing, the United States agrees that 300,000 acre-feet of American Falls Reservoir storage should be available for power generation. If Idaho Power Company only holds 45,000 acre-feet, one wonders who else would have access to the remaining 255,000 acre-feet (which, incidentally, is precisely the same amount made available to Idaho Power Company as secondary

⁶ U.S. Brief at 2.

storage in the 1923 Contract.)⁷

C. There Is No Proof In The Record That Complying With The 1923 Contract Terms Would Have Any Effect on Irrigators.

The United States makes the "factual" statement that providing Idaho Power Company access to its 255,000 acre-feet of secondary storage capacity in American Falls Reservoir would "have an obvious impact" on the "irrigation community." U.S. Brief at 1. There is no evidence in the Record to support this claim.

The Court will note that the United States makes numerous references throughout its Brief to the fact that priority in the American Falls Reservoir is given to irrigation interests, and

⁷ As an aside, this Court recognized Idaho Power Company's amendment to its Objection in Subcase 01-2064 on February 8, 2010. That amendment includes the following "Purpose of Use" proposed language with figures virtually identical to those of the United States, begging the question why this litigation is even necessary:

Irrigation Storage should be 1,655,000 AFY
Irrigation from storage should be 1,655,000 AFY
Power Storage should be 300,000 AFY
Power from storage should be 300,000 AFY

The exercise of this water right is subject to the obligation of the United States to comply with the terms and conditions contained in contract nos. 11r-733 and 11r-733S between the United State Bureau of Reclamation and Idaho Power Company.

Likewise, the State of Idaho's Objection dated 10/16/97 preserves virtually identical language. The IDWR Director's Report for 01-2064 included the following quantities under "Purpose and Use:"

Irrigation Storage should be 1,628,316 AFY
Irrigation from storage should be 1,628,316 AFY
Power Storage should be 295,163 AFY
Power from storage should be 295,163 AFY

The State of Idaho's Objection suggested changes in the Purpose and Use section relating to the contracts cited, but did not propose to change the quantities.

Thus, every party that has filed an Objection in this case has recognized that approximately 300,000 acre-feet of storage in the American Falls Reservoir has an intended use of power generation. 300,000 acre-feet is equivalent to Idaho Power Company's 45,000 AF active storage capacity right (which the company can call for) and its 255,000 secondary storage capacity right (which the company cannot call for). There is simply no other explanation for the Purpose and Use provisions than that Idaho Power Company has access to 300,000 acre-feet of storage in the Reservoir.

that Idaho Power Company has always recognized that irrigation rights in the Reservoir take priority (except in relation to the Company's 45,000 acre-feet of active storage in the Reservoir which is on par with the storage rights of irrigation stakeholders). On its face, these facts, aside from being true, are legally meaningless for the purposes of this case.

It is not until pages 36 and 37 of the U.S. Brief that the United States explains why these facts are supposedly relevant. The United States claims that if this Court recognizes Idaho Power Company's secondary storage right, the irrigators' interests will be hurt because the water that flows through the reservoir in the winter to meet the flow targets below Milner will not be stored, resulting in a "higher probability" that the Reservoir will not fill. U.S. Brief at 36. According to the United States, this would mean less water during the irrigation season. This argument, while appearing logical on its face, fails when exposed to minimal analysis.

First, the United States has not provided any proof to support this statement. No expert report was filed. No modeling has been completed to support the allegation. There is nothing in the Record supporting this hypothetical claim of injury.⁸

Second, disfavoring and disavowing the terms of the contract it entered in 1923 are hardly legal grounds to ask the Court for rescission. If there is the potential for parties to be hurt because of the Contract – which is most certainly not the intention of the Idaho Power Company – then the United States has an obligation to renegotiate the contract in good faith.⁹ If, in fact, the Upper Snake River storage system is over-subscribed, and there is insufficient water in the

⁸ The United States, the State of Idaho, and the Spaceholders had the opportunity to develop expert reports on this issue but did not do so. Any opinions on the matter in the Briefs, or in attached affidavits, are but lay opinions not based on hard data or facts in the record.

⁹ The United States also implies on page six of its Brief that the basis for the 1923 Contract was an assumption that there would be enough water to meet the Company's secondary storage claim, and that now there is not sufficient water to do so. Apparently, the United States is attempting to argue that the Contract rights are impossible to fill because there is not sufficient water in the system. This is not only factually suspect, but impossibility is not a basis to rescind a contract, it is a legal response to a damages claim under a contract. If the United States wishes to make an impossibility argument in the Court of Federal Claims, it will have the opportunity to do so. But this case is about whether or not the contract right exists.

system to meet all Placeholder demands, it was the U.S. who faulted in contracting to deliver more water than was or is actually available for delivery. Even assuming that is true, though no proof has been submitted by any party on this point, it is still no basis for rescission of Idaho Power's contract rights.

Finally, the United States is acting as if the American Falls Reservoir is not part of the massive snake river system managed by BOR. While no one has been able to explain to Idaho Power Company precisely how the system is operated, a few facts are known. The BOR operates the system above Milner Dam,¹⁰ and there is a significant amount of water left in the system at the end of each season.¹¹ In fact, as explained in the Bowling Deposition, for the years at issue in the Company's damages claim, there was sufficient water in the System to meet the Company's contract rights.¹²

Regardless, there is no proof to support the United States' allegation that meeting flow rates below Milner would jeopardize irrigation storage in the Reservoir.¹³

D. Idaho Power Company's Proportionate Storage Rights Were Not "Understood By All" To Be 45,000 Acre-Feet When The 1973 Dam Replacement Legislation Was Enacted.

This statement in the U.S. Brief at FN 19 is simply false. It ignores the correspondence, memoranda, and various other documentation cited in IPC's Brief specifically recognizing the Company's secondary storage right from the periods before and after the enactment of the 1973 Reconstruction legislation. While the entire IPC Brief is designed to address this question, the

¹⁰ Transcript of Deposition of John Bowling at 51:18.

¹¹ Id. at 173:9.

¹² Id.

¹³ As noted in the Responses to other parties, this question of "injury" to irrigators as a basis for rescinding a contract is not only a legally-void basis to rescind a contract right, it is a question of fact. The Court cannot grant summary judgment as to whether or not there would be an "injury" to irrigation interests based on these Briefs, thus it would be necessary to hold a full trial on this issue. Regardless, the issue has no relevance whatsoever to whether or not the Company's contract rights remain in force.

Company would refer the Court to pages 11-22 of the IPC Brief and Exhibits 7-49. Also, the two Martz memos referenced above are directly on point. IPC Brief Ex. 57, and Ex. 68 (attached to this Brief).

One only has to read the text of Ex. 68 to understand just how inaccurate the United States' allegation is. For, on March 14, 1974 – the year *after* the Dam Reconstruction Legislation was enacted by Congress in which Congress specifically protected existing spaceholders' proportionate storage rights – the BOR's regional supervisor of Power wrote a memorandum to the Regional Supervisor of BOR stating:

If, on the other hand, there would be no interference with Government operations of the reservoir to **continue to allow the Company to use the so-called secondary storage**, then that could be done and the [Operation and Maintenance] charge to the Company would be higher

This memorandum is relevant on a number of points. First and foremost, it states the government's position that Idaho Power Company held and was using its secondary storage capacity at the time the reconstruction legislation was enacted in 1973. Further, it provides written evidence that the United States was ignoring Congressional intent when negotiating the Company's 1976 Spaceholder contract by contemplating not allowing the Company to "continue to use" its secondary storage right. Finally, it clarifies once and for all that the Company was paying operation and maintenance charges on its secondary storage rights at the time the negotiations for the 1976 Spaceholder Contract were underway in 1974. All of these issues are addressed in this Response or in IPC's Brief. But all provide strong evidence of the existence of the Company's secondary storage right.

Regardless, it remains difficult for Idaho Power Company to understand why the United States would argue that the Company's secondary storage capacity right was not recognized as part of the Company's proportionate storage right protected by the 1973 Dam Replacement

Legislation when BOR specifically recognized that right before and after the legislation was enacted.

E. The United States' Attempt to Explain Idaho Power Company's Payments For Operation And Maintenance Pursuant To The 1976 Spaceholder Contract is Unsubstantiated.

As discussed in IPC's Brief, Section III.E., Idaho Power Company has paid Operation and Maintenance ("O&M") charges for the American Falls Dam and Reservoir since 1923. The payments are based on the formula included in Article 17 of the 1923 Contract which takes into account Idaho Power Company's active storage capacity as well as its secondary storage capacity. The fee for secondary storage capacity is only a fraction of the cost for active storage because of the unique nature of secondary storage.

The United States understands that if it has been levying Reservoir O&M charges against Idaho Power that include payments for its secondary storage capacity right, it would seem disingenuous for the United States to now claim that the right does not exist. Thus, the United States attempts to explain away the fact that Idaho Power Company is required to pay over 7% of the O&M charges for the Reservoir in spite of holding only approximately 2.6% of active storage in the reservoir as simply an "agreed upon" number negotiated as part of the 1976 Spaceholder Contract's terms. Further, according to the United States, the reason that Idaho Power Company agreed to pay nearly three times more in proportional O&M than any other Spaceholder was because it was being a good actor and attempting to avoid conflicts with irrigators. While the Company certainly agrees with the United States assertion that it is a good actor, the Company's beneficence was not the basis for the O&M charges.

In fact, the 1976 Contract itself includes an explanation of how O&M charges should be determined. And, again, the United States misinterprets the 1976 Contract, and leaves out key language when it cites the relevant contract provision. The United States claims:

For purposes of calculating O&M payments, the 1923 Contract instructed that each acre-foot of secondary storage capacity 'shall be considered equivalent to 7/20ths of an acre-foot of storage capacity.' The contract then set out a formula which resulted in Idaho Power paying 7.1388 percent of the total O&M fees. the 1976 Spaceholder Contract dispensed with the formula and instead simply required Idaho Power to pay 7.1388% of [O&M].

U.S. Brief, FN 25

The United States is mistaken. In fact, the 1976 Spaceholder Contract specifically states that Idaho Power Company's O&M costs "shall be determined in accordance with the applicable provisions of the Existing Spaceholder Contract." 1976 Spaceholder Contract, Article 28(b). Pursuant to the 1976 Spaceholder Contract, the "Existing Spaceholder Contract" is the 1923 Contract. *Id.* at 4.

Thus, the parties did not simply shake hands and agree on a number. The formula contained in the 1923 Contract for determining Idaho Power Company's O&M charges – including payments for both active and secondary storage capacity – was carried forward by the terms of the 1976 Spaceholder Contract.¹⁴

While Idaho Power Company was, and remains, committed to maintaining positive relations with the other Spaceholders, that was not the basis for Idaho Power Company's O&M payments. The 1923 Contract is the basis for the charges which is why the bills received from the United States for O&M have always cited the 1923 Contract as the legal basis for the charges. *See* IPC Brief, Ex. 63.

¹⁴ The formula was also specifically referenced in the Martz memo, Ex. 68, in which BOR discusses the fact that if the Company is allowed to continue using its secondary storage right, its O&M charge would be higher then if it was not allowed to continue to use its secondary right. Clearly, if the Company was prevented from access to its secondary right, its O&M charges would have been equal to the percentage of active storage space it holds in the Reservoir – just like every other Spaceholder. *See* Ex. 68.

II. CONTRACT LAW PRINCIPLES SHOULD GOVERN THE COURT'S ANALYSIS IN THIS ACTION, NOT PRINCIPLES OF EQUITY

Idaho Power Company's storage rights in the American Falls Reservoir stem from the 1923 Contract. Whether or not those rights remain in force is a question of contract law, not a question of equitable estoppel, quasi-estoppel, or any other equitable theory.

Courts have long held that, while equitable remedies such as Specific Performance or Injunction may be warranted in certain instances to ensure a party is made whole when there is a breach, there is no support for a Court applying equitable principles such as quasi-estoppel to rescind contract rights. *See e.g. Hedges v. Dixon County*, 150 U.S. 182, 189 (1893) (holding that "equity follows the law ... wherever the rights or the situation of parties are clearly defined and established by [contract], equity has no power to change or unsettle those rights or that situation."); *see also Allen v. Kitchen*, 100 P. 1052, 1057 (Idaho 1909) (noting that absent deception, fraud, or mutual mistake, courts of equity have no power to construct or reconstruct a contract or insert new elements in order to make a contract valid and binding.)

Aside from the equitable claims the United States has presented, which are addressed specifically below, the United States has argued that the Company abandoned its contract rights because there were periods in the 1980's and 1990's when the Company did not call for its secondary storage. Even if this was the case, there would be no grounds under contract law to rescind Idaho Power Company's rights based on the theory of abandonment.

A. Idaho Power Company Never Abandoned its Contractual Rights Under The 1923 Contract.

Rights acquired under a contract may only be abandoned or relinquished by agreement or intent and conduct clearly indicating such purpose. *See American Silver Min. Co. v. Coeur D'Alene Mines Corp.*, 480 P.2d 900, 906 (Idaho 1971) ("Abandonment is a matter of intent with corresponding conduct...."); *see also Copenhaver v. Lavin*, 448 P.2d 774 (Idaho 1968). To

constitute abandonment of contract rights, an actual intent to abandon must exist, *Palmer v. Fuqua*, 641 F.2d 1146 (5th Cir. 1981), and there must be proof of the intent. *Id.* at 1160.

While the requisite intent may be inferred from the conduct of the parties, an abandonment does not occur unless the right-holder, with full knowledge of all material facts, does or bears the doing of something inconsistent with the right or with an intention to rely on it. *See Copenhaver*; *see also Russell v. Russell*, 578 P.2d 1082 (Idaho 1978). Further, mere passage of time and inaction under a contract does not necessarily constitute abandonment of contract rights, *Liston v. Home Ins. Co.*, 659 F. Supp. 276 (S.D. Miss. 1986). Finally, whether there has been abandonment is a question of fact to be ascertained from all surrounding facts and circumstances, *American Silver Min. Co.*, 480 P.2d at 906; *see also Gillis v. Gillette*, 184 F.2d 872, 875 (9th Cir. 1950).

There is simply no basis to argue that the Idaho Power Company abandoned its secondary storage rights. Mere passage of time, which is the United States' entire basis for claiming Idaho Power Company's rights were abandoned, is insufficient to establish abandonment. Further, there was certainly no "overt act" on the part of the Company that would be sufficient proof of intent to abandon. In fact, the United States has provided no evidence at all that would establish the requisite intent to abandon.

There was no intent to abandon, and there was no overt act conveying an intent to abandon. The Company paid Operation and Maintenance charges for both its active and secondary storage right in the Reservoir every year since 1923. It would not have paid those charges if it intended to abandon the rights. Therefore, the Court must determine that Idaho Power Company's contract rights were never abandoned.¹⁵

¹⁵ Along the same lines, even if the United States' allegation that there is insufficient water to meet the company's storage rights is true, one must ask how a contract right could simply disappear based on the availability of water. All spaceholders enter contracts with the United States for American Falls Reservoir storage. In drought years if

III. IDAHO POWER COMPANY'S CONTRACT RIGHTS CANNOT BE RESCINDED BY QUASI-ESTOPPEL

While Idaho Power Company has explained that the United States' attempt to rescind a contract by application of equitable theories is improper under the law, we respond to the argument below for the sake of completeness.

The United States cannot establish the elements necessary for an estoppel claim. The United States claims that Idaho Courts have recognized that quasi-estoppel prevents a party from being able to gain an unconscionable advantage, or impose an unconscionable disadvantage upon another, by changing positions. U.S. Brief at 32, *citing Garner v. Batschi, Mundell v. Brigham*. The United States cannot meet the standards required to establish quasi-estoppel because the Company did not change its position, and because recognizing existing contract rights cannot be considered "unconscionable."

As noted throughout this Brief, the United States' efforts to paint Idaho Power Company's positions prior to the filing of its Objection in this case and pursuing damages for the United States' failure to meet minimum flows below Milner are based on the United States' failure to read phrases such as "active capacity" or "demand" in a manner that has actual meaning.¹⁶ The Company has never taken the position that it did not maintain the right to secondary storage capacity in the Reservoir. As such, it has not changed its position.

Further, the term "unconscionable" means "not in accordance with what is right or just." *New Merriam-Webster Dictionary*, 1989 at 783. It is hardly unjust to grant Idaho Power Company the contractual rights it is due (as fully explained in IPC's Brief). In fact, as argued by Idaho Power in its Brief, it would be "unconscionable" for the United States to suddenly change

those contract rights cannot be met it does not mean that the contracts are void. In subsequent wet years the contract terms would be met. Regardless, the rights would always remain. The same is true for Idaho Power Company's contract rights. They cannot be said to simply disappear if there is insufficient water to meet those rights.

¹⁶ See, for instance, the quotations on page five of this Brief.

its position as to the amount of storage capacity available for power generation in the Reservoir so as to deprive Idaho Power Company of the secondary storage capacity right it holds by contract and which it has been paying O&M charges on for more than a century.¹⁷

The United States' equitable theory fails because Idaho Power Company did not change its position and because the recognition of existing contract rights held by Idaho Power Company is not unconscionable.

IV. IDAHO POWER'S CONTRACTUAL RIGHTS ARE NOT PRECLUDED BY STATUTE OR CONTRACT

IPC's Brief explains in detail why the Company's contract rights remain valid in the face of federal legislation and post-1923 contracts. Rather than repeat those explanations, we refer the Court to the discussion contained in that Brief, and specifically the discussions on pages 25 through 33 and 39 through 41. In short, neither the Dam Replacement legislation of 1973, the Bond legislation of 1975, nor the Spaceholder Contract of 1976 rescinded, or could rescind, Idaho Power Company's secondary storage capacity right.

Further, the United States misinterprets the meaning of the 1973 Reconstruction legislation when it implies that the phrase in the legislation that specifically reaffirms existing contract rights somehow also rescinded Idaho Power Company's secondary storage capacity right. U.S. Brief at 38. This interpretation is simply incorrect, not to mention contradictory.¹⁸

Regardless, Idaho Power Company urges the Court again to closely review the language cited by the United States as the basis for its claims. A close reading will lead the Court to the

¹⁷ See also FN 7, above, quoting the United States' Objection in this case.

¹⁸ The United States seems to conflate the purposes of the rebuild legislation, the secondary storage right, and the "Falling Water Contract." The three things have nothing to do with each other. In fact, the "Falling Water Contract" was—as explained in IPC's Brief—implemented for generation of power at American Falls. The Company's secondary storage right was, by contract, to be used to provide flows below Milner Dam. Further, there is no explanation of how meeting Idaho Power's contract terms could possibly effect the "efficiency" of any structure in the Snake River system.

inescapable conclusion that there is no basis for the United States' claim that Idaho Power Company's secondary storage right was precluded by law or by contract.

V. THE UNITED STATES HOLDS IDAHO POWER COMPANY'S PRIMARY AND SECONDARY STORAGE RIGHTS IN TRUST¹⁹

Finally, the United States closes its Brief with the assertion that the State of Idaho could not impose a trust relationship on the Federal Government. Apparently the United States has only now realized that nearly forty years ago the Order of Director Higginson stated that Idaho Power Company's rights were held in trust by the United States. The United States has never questioned that Order prior to this litigation.

While this issue is not necessary for this Court to address in this litigation, in the interest of completeness and in order to provide this Court with the background necessary to understand the Trust issue, we have included this section in our Response. Again, Idaho Power Company's Motion for Summary Judgment seeks a declaration by this Court that the contractual storage capacity rights afforded to Idaho Power Company in the 1923 Contract remain valid and enforceable. Whether those rights are held by Idaho Power Company or whether they are held in trust by the United States for Idaho Power Company is not a question that needs to be addressed by the Court in response to this Motion unless the Court so-chooses. The rights exist regardless of which party holds them.

The 1923 Contract between the United States and Idaho Power created a trust relationship under which Idaho Power preserved its right to use 300,000 acre-feet of storage in American Falls Reservoir. In 1971, the IDWR²⁰ affirmed this relationship, expressly finding that Idaho Power's American Falls storage rights are held in trust by the United States for the benefit

¹⁹ Idaho Power Company maintains that the determination of whether the United States holds Idaho Power Company's contractual rights in trust is not necessary for this Court to decide.

²⁰ At the time it issued the Order to Show Cause referenced below, IDWR was known as the Idaho Department of Water Administration. Before that it had previously been named the Idaho Department of Reclamation. The agency will be referred to as IDWR throughout the remainder of this Response for clarity.

and use of Idaho Power. Such a finding is consistent with the Idaho Supreme Court's decision in *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). In recognizing that an entity that applies water to beneficial use possesses more than a contractual water right, the *Pioneer* court found that title to water is held by consumers of users of the water. *Pioneer*, 157 P.3d at 608-09. Idaho Power, as the user of its American Falls storage rights, retains an interest in those rights that is greater than a "mere contractual expectancy," even though the United States may also hold nominal legal title to those rights. *Id* at 608.

If it decides to address this issue, the Court, in recognizing that the primary and secondary storage capacity rights afforded to Idaho Power Company in the 1923 Contract remain valid, should declare that those rights are held in trust by the United States.

A. The 1923 Contract Imposes A Trust Relationship Between Idaho Power and The United States.

Under the 1923 Contract between the United States and Idaho Power, Idaho Power conveyed certain real property and easements to the United States that allowed the United States to construct American Falls Reservoir. *See* 1923 Contract, IPC Brief Ex. 1. In exchange, Idaho Power reserved 300,000 acre-feet of storage rights in the reservoir that had previously been covered by Idaho Power's state permits. That 300,000 acre-feet included a right to "the perpetual use of 45,000 acre-feet of storage capacity" in American Falls Reservoir "for storing the water reserved to the company," as well as a "secondary right to use not to exceed 255,000 acre-feet of storage capacity in the reservoir when such capacity is not then required and not being used by the owners of irrigation rights to the use of such capacity." *Id.* ¶¶ 16, 18.

The United States and Idaho Power specifically agreed that Idaho Power was not surrendering its existing water rights, but instead was allowing the United States to hold those rights in connection with the storage of water in American Falls Reservoir. The 1923 Contract unambiguously provided that Idaho Power retained its American Falls Reservoir storage rights as

appropriations under state law, and that those rights were not simply contract rights for water obtained under an agreement with the United States:

But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations and are not to be considered as mere contract rights under contract with the United States.

Id. ¶ 9(d). The parties expressly intended that all power rights at American Falls, except those granted to the United States, "shall be reserved to the company and that the deeds and conveyances by the company to the United States may contain a reservation in favor of the company of the rights reserved to it" under the agreement. *Id.* ¶ 30.

Through this language, the 1923 Contract effectively created a trust relationship between the United States and Idaho Power with respect to Idaho Power's 300,000 acre-feet of storage in American Falls Reservoir. The United States allowed Idaho Power to retain its American Falls storage rights as more than "mere contract rights," acknowledging that Idaho Power reserved its rights out of its existing appropriations under state law. *See id.* ¶ 9(d). At the same time, the 1923 Contract gave the United States the necessary property rights to construct and manage American Falls Reservoir, giving the United States the authority to "hold" Idaho Power's reserved rights for the use of Idaho Power. Although the parties do not use the word "trust" in the 1923 Contract to describe this relationship, that word precisely describes the relationship between the United States and Idaho Power with respect to Idaho Power's American Falls storage rights under the agreement.²¹

²¹ A "trust" is defined as (1) the "right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds legal title," or (2) a "fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit." *Black's Law Dictionary* 1649-50 (9th ed. 2009). Under either of these definitions of a trust, Idaho Power's American Falls storage rights are held in trust by the United States under the 1923 Agreement.

B. IDWR Has Determined That The United States Holds Idaho Power's American Falls Storage Rights In Trust.

In a 1971 decision relating to the status of two of Idaho Power's permits, IDWR found that Idaho Power's water rights in American Falls Reservoir "are held in trust for use by the Company under the water rights of the United States." Memorandum Decision, April 21, 1971 at 2, U.S. Brief Ex. BB ("Higginson Decision"). IDWR based its decision upon the language of the 1923 Contract cited above, acknowledging that Idaho Power retained the use of its storage rights even though the United States legally held the permits that covered those rights. *See id.* at 2.

The Higginson Decision arose out of an IDWR Order to Show Cause with respect to two permits held by Idaho Power, Permits 15201/01-2041 and R-273/01-2065. IDWR Order to Show Cause, October 1, 1970, attached as Ex. 69. Idaho Power had sought those permits in 1921 in order to divert 1,200 c.f.s. and store 300,000 acre-feet of water for power purposes at the future American Falls Reservoir site. *Id.* In 1932, IDWR notified Idaho Power that IDWR intended to reject Idaho Power's Proof of Completion of Works under those permits, as a Certification of Completion of Works had already been issued to the United States for the full capacity of American Falls Reservoir. *Id.* However, IDWR never actually rejected Idaho Power's Proof of Completion of Works at that time. In its 1970 Order to Show Cause, IDWR ordered Idaho Power to show cause as to why Idaho Power's Proof of Completion of Works should not have been rejected and the permits cancelled. *Id.*

Idaho Power submitted an answer to IDWR's order that described its construction of power facilities at American Falls in the early 1900s and its acquisition of specific water rights for power production. Answer to Order to Show Cause, December 1, 1970, U.S. Brief Ex. DD ("Answer"). Idaho Power also described the context under which it entered into the 1923 Contract, as well as the water rights reserved by Idaho Power under that Contract:

[I]n order to enable the United States of America to construct the irrigation storage reservoir, the United States and the Company developed a plan under which the Company **reserved its existing water rights**, and conveyed the necessary portions of its real property and easements to the United States. The Company retained its East Side generating station with its appurtenant diversion dam, **and was guaranteed by the United States the right to the amount and time of use of its reserved water rights**. To effectuate this plan a contract was entered into between the United States and the Company on the 15th day of June, 1923.... (Emphasis added.)

Answer at 3-4 (emphasis added). In its Answer, Idaho Power also identified specific provisions of the 1923 Contract that preserved and defined the Company's rights to 300,000 acre-feet of storage in American Falls Reservoir under Permit No. R-273. Those provisions include paragraphs 16 and 18 of the 1923 Contract, which are quoted above.

As Idaho Power further noted in its Answer:

[The 1923 Contract] specifically provided that the Company was not surrendering, or in any way disposing of its existing water rights but was only permitting the United States to use them in connection with its American Falls Reservoir, subject, however, to the Company's reserved rights as follows [setting forth paragraphs 6, 9(d), and 30 of the 1923 Contract].

Answer at 5.

Idaho Power also identified the trust relationship between the United States and the Company:

[B]y operation of law the Secretary of the Interior holds the water available in American Falls Reservoir under Permit No.s R-269 and 15134 **as trustee for the Company and all other contract holders**. The Company has continuously applied to a beneficial use its rights in said stored water, as have all other contract holders; and the Company and all other such contract holders are the equitable owners of the right to so use these waters.

Answer at 7 (emphasis added). In light of this relationship, Idaho Power asked IDWR to find the following:

(a) that all of the rights of the Company covered by Permit No.s R-273 and 15502 have been merged into rights granted to the Secretary of the Interior in Permit No.s R-268 and 15134;

(b) that the Secretary of the Interior holds and maintains the rights under said permits as trustee for the Company of all of the rights covered by Permit No.s R-273 and 15502; and

(c) that in accordance therewith no further action need be taken with respect to Permit No.s R-273 and 15502.

Answer at 8.

In the Higginson Decision, IDWR agreed with Idaho Power and found that Idaho Power's water rights in American Falls Reservoir "are held in trust for use by the Company under the water rights of the United States." Higginson Decision at 2. Consistent with Idaho Power's request, IDWR found that Idaho Power's rights had "merged" with the rights of the United States. *Id.* However, instead of taking "no further action" as requested by the Company, the Director cancelled Idaho Power's permits:

[T]he Director finds that the rights established by Idaho Power company, by reason of Permit Nos. 01-2041 and 01-2065, have been merged with rights granted the United States of America and that by reason of contracts and agreements entered into between the Company and the United States of America, Bureau of Reclamation, **those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir.**

...

The Director further finds that since the Company's rights to water at American Falls Dam and Reservoir are already covered by reason of Licenses issued to the United States of America, under Permit Nos. R-269 and 4168 and contracts between the Company and the United States of America, that Permit Nos. 01-2041 and 01-2065 are duplicate and should be cancelled.

Id. at 2 (emphasis added). On April 22, 1971, IDWR issued an Order of Cancellation of Idaho Power's Permit No. R-273. Order of Cancellation, Ex. 70.²²

As the language quoted above shows, IDWR cancelled Idaho Power's permits because

a) Idaho Power's rights at American Falls merged by contract with the rights granted to the United States; b) the rights are held in trust by the United States for use by Idaho Power; and c)

²² Idaho Power would bring to the Court's attention the fact that the United States is one of the "cc" recipients of the Order. Clearly, the United States received a copy of the Order but still did nothing to raise a concern about it – at least not for nearly forty years.

the rights are already covered under the permits issued to the United States. IDWR cancelled Idaho Power's permits simply because they were duplicative of the permits already issued to the United States – not because Idaho Power no longer had any right to use the water it had claimed under the cancelled permits.

The Higginson Decision is a determination by IDWR that under Idaho law, the United States holds Idaho Power's 300,000 acre-foot hydropower water rights at American Falls Reservoir in trust for the benefit of Idaho Power. Idaho Power did not challenge IDWR's cancellation of Idaho Power's permits because no challenge was necessary. IDWR's decision expressly acknowledges Idaho Power's continued use of its American Falls rights, even though Idaho Power's rights fall under the scope of the permits held by the United States.

The Higginson Decision remains binding, and IDWR possessed jurisdiction to define the relationship between the United States and Idaho Power under the 1923 Contract as a trust. IDWR was not imposing a new obligation on the United States, but instead was simply affirming the trust relationship created by the parties under the 1923 Contract. The Higginson Decision did not alter the scope of the United States' permits for American Falls Reservoir.

Similarly, case law limiting the federal government's trust obligations under BOR contracts is inapplicable here, where the 1923 Contract specifically defined Idaho Power's rights as beyond "mere contract rights." 1923 Contract ¶ 9(d). *Cf. Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp.2d 1224 (E.D. Cal. 2003); *Elephant Butte Irr. Dist. v. U.S. Dept. of Interior*, 269 F.3d 1158, 1166 (10th Cir. 2001). Cases like *Del Puerto* and *Elephant Butte* deal with more traditional BOR projects and contracts under which water users acquired any right to use directly from BOR. Those cases do not address agreements like the 1923 Contract, under which Idaho Power retained its preexisting storage rights for the United States to

hold in trust. By entering into the 1923 Contract, the United States stated its intent to hold Idaho Power's storage rights for the use and benefit of Idaho Power.

C. Under *Pioneer*, Idaho Power Possesses Equitable Title To Its American Falls Storage Rights As The Beneficial User Of Those Rights.

The trust relationship between Idaho Power and the United States with respect to Idaho Power's American Falls storage rights is consistent with the Idaho Supreme Court's recent decision in *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). Idaho Power, as the beneficial user of its storage rights, holds equitable title to those rights even though the United States may also hold nominal legal title.

In *Pioneer*, the Idaho Supreme Court found that "as a matter of Idaho constitutional and statutory law[,], title to the use of the water is held by the consumers or users of the water." *Pioneer*, 157 P.3d at 609. In that case, which addressed an appeal of a SRBA decision, the court concluded as follows:

Based upon the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the **entity that applies the water to beneficial use has a right that is more than a contractual right.**

Id. at 609 (emphasis added). The court found that the irrigation district plaintiffs held "an interest on behalf of the water users pursuant to state law," and noted specifically that such interest is "derived from law and is not based exclusively on the contracts between the Bureau of Reclamation" and the water users. *Id.* Beneficial users of water possess "an interest that is stronger than a mere contractual expectancy." *Id.* at 608.

The *Pioneer* court based its decision upon a number of United States Supreme Court cases interpreting state law and the Reclamation Act, the Reclamation Act itself, the Idaho Constitution, and Idaho statutory and case law. A common thread in the court's analysis of these cases and provisions is the importance of the beneficial use of water and the right that such use

bestows upon a water user. *See, e.g., Albrethsen v. Wood River land Co.*, 40 Idaho 49, 60, 231 P. 418, 422 (1922) (finding that the right to use the public water of the state can only be claimed where it is applied to beneficial use in the manner required by law); Idaho Code § 42-220 (the "right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure to pay the ordinary charges or assessments"); Idaho Code §§ 42-101, 42-104, 42-201(1), 42-217 (all recognizing the importance of beneficial use in perfecting a water right).

Under the 1923 Contract, title to the use of Idaho Power's storage rights in American Falls Reservoir was retained by Idaho Power as the "consumer or user of the water" within the meaning of *Pioneer*. This interpretation is expressly supported by the language of the 1923 Contract, which itself states that Idaho Power retained more than "mere contract rights." 1923 Contract ¶ 9(d). This language is identical to the court's determination in *Pioneer* that beneficial users of water possess "an interest that is stronger than a mere contractual expectancy." *Pioneer*, 157 P.3d at 608.

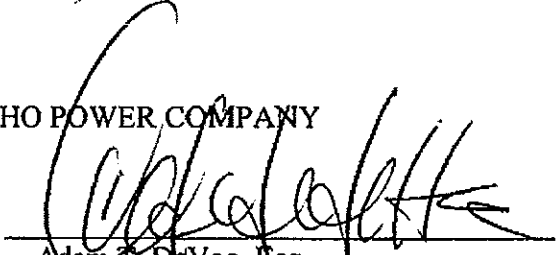
If the United States holds title to Idaho Power's 300,000 acre-feet of storage rights in American Falls Reservoir, at most it is a nominal title holder holding those rights in trust for the benefit of Idaho Power. Idaho Power, as the consumer and user of the water, holds equitable title to its storage rights at American Falls Reservoir under *Pioneer*. Such a relationship highlights both the language of the 1923 Contract and the 1971 Higginson Decision, which demonstrate that the United States holds Idaho Power's storage rights in trust for the benefit and use of Idaho Power.

CONCLUSION

The U.S. Brief contains a variety of factual and legal errors. The arguments made by the United States are not supported by fact, Record evidence, or the law and simply cannot be upheld by this Court.

Dated this 16th day of November, 2010.

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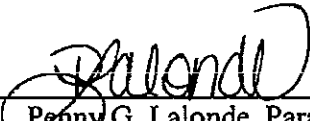
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2010, I caused the foregoing document entitled **RESPONSE TO UNITED STATES MOTION FOR SUMMARY JUDGMENT** to be filed with the Court and served per the method indicated below upon the following:

Clerk of the District Court Snake River Basin Adjudication 253 Third Avenue North PO Box 2707 Twin Falls, ID 83303-2707	☒ Hand Filed Original and 1 working copy
IDWR Document Depository PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail, postage prepaid
Clive Strong David Stanish Office of the Attorney General Natural Resources Division 700 West State Street Joe R. Williams Building, Second Floor P.O. Box 83720 Boise, Idaho 83720-0010	☒ E-Mail: clive.strong@ag.idaho.gov david.stanish@ag.idaho.gov
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